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Supreme Court, U.S.
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No. 92-1272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JIT KIM LIM, M.D.,

Petitioner,

v.

CENTRAL DU PAGE HOSPITAL, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONSE OF THE MONA KEA DEFENDANTS* TO PETITION FOR WRIT OF CERTIORARI

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The Mona Kea Defendants are:

Mona Kea Leasing Association, Mona Kea Owners Association, Mona Kea South Professional Condominium Association, Richard Dominguez, M.D., James H. Grissom, M.D., Donald Gustafson, M.D., Douglas B. Mains, M.D., and Ronald M. Severino, M.D.

QUESTION PRESENTED FOR REVIEW

Whether this Court should review a decision of the Seventh Circuit Court of Appeals which upheld the dismissal of Petitioner's First Amended Complaint in that Petitioner's action was "substantially the same" as his previous suit in which he had been given a fair and full opportunity to litigate his claims, therefore, Petitioner's second suit was barred by the doctrine of *res judicata* and where Petitioner has failed to show any conflict with any decision of this Court or with the decisions of any Circuit Court of Appeals.

RULE 29.1 STATEMENT

The parties to the proceeding are all named in the caption shown on the cover of the Petition. None of the "Mona Kea Defendants" has publicly owned parents, subsidiaries or affiliates.

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OPINIONS BELOW

The opinions below are adequately described in the Petition.

STATEMENT OF JURISDICTION

The statement of jurisdiction is properly set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

As noted in the Petition, the issues raised therein arise out of the Seventh Circuit's dismissal of Petitioner's suit based on the doctrine of *res judicata*, therefore, no statutory provisions are involved.

STATEMENT OF THE CASE

The statement of the case set forth in the Petition fails to adequately describe the chronology of procedural events which, when properly noted, illustrate that Petitioner was given more than ample opportunity to pursue the antitrust claims. Petitioner's failure to take advantage of the procedural process available to him does not justify the granting of a writ of certiorari.

The First Suit

Petitioner filed an antitrust claim in the district court in 1986. Two days later the Seventh Circuit decided *Ezpeleta v. Sisters of Mercy Health Corp.*, 800 F.2d 119 (7th Cir. 1986) holding that future antitrust claims regarding staff privileges may be "deemed frivolous because of the clear bar of the state action doctrine" (A-4).[1] As a result, Petitioner voluntarily withdrew his antitrust claim. In its place, Petitioner filed a second amended complaint based upon civil rights violations. The district court dismissed

[1] Appendix page references are made to the appendices contained in the Petition.

the complaint on January 15, 1988. On May 16, 1988, the Supreme Court decided *Patrick v. Burget*, 485 U.S. 94, 108 S.Ct. 1658 (1988). *Patrick* effectively overruled *Ezpeleta*. At the time the Supreme Court decided *Patrick*, Petitioner had just filed his belated appellate brief. As aptly noted by the Circuit Court in its decision in this case, Petitioner was less than diligent in pursuing his prior appeal (A-11,12).

It was not until four months after *Patrick* was decided and four days prior to oral argument that Petitioner filed a motion in the Seventh Circuit entitled "Motion for Leave to Cite Recent Authority and for Additional Procedural Relief." As a result of *Patrick*, Petitioner sought in that motion "leave to reinstate the anti-trust counts of this litigation and for remand thereof to the district court." Petitioner, however, failed to pursue his request for remand. Counsel did not assert that position at oral argument nor did he bring it to the Court's attention in his petition for rehearing after losing in the Seventh Circuit the first time.

On March 24, 1989, the Circuit Court affirmed the District Court's judgment dismissing the civil rights counts, but did not grant Petitioner leave to reinstate his antitrust counts or remand the cause to the district court. *Lim v. Central DuPage Hosp.*, 871 F.2d 644 (7th Cir. 1989). The Circuit Court denied rehearing *en banc* on May 30, 1989. *Id.*

Five months later Petitioner filed a Rule 60(b)(6) motion in the district court. In that motion, Petitioner argued that extraordinary circumstances mandated that the district court vacate its judgment against him as a result of the *Patrick* decision. Petitioner maintained that a change in antitrust law amounted to an extraordinary circumstance. The district court denied that motion. Peti-

tioner appealed but failed to file his appellate brief even though the Circuit Court issued two orders instructing Petitioner to respond as to why the appeal should not be dismissed for lack of prosecution. Petitioner's Rule 60(b)(6) motion was eventually denied.

The Second Suit

On the same date Petitioner filed his Rule 60(b)(6) motion in the first suit, he filed a new action based on substantially the same facts as alleged in his 1986 suit. This action was assigned to the same district court as the earlier action was.

In the new action, Petitioner added new defendants, including the Mona Kea Defendants. He re-asserted his antitrust claims, and added RICO claims as well as pendent state tort claims.

In two separate opinions the district court found that *res judicata* barred the federal claims against all defendants (Appendices G and I). The Circuit Court affirmed noting as the district court had that "[t]he plaintiff has filed two cases, five separate complaints, two appeals [now four], and numerous motions to reconsider and/or vacate. At some point it is unfair to require the Defendants to repeatedly renew their defense in a case which they reasonably believed to be closed against them" (A-12).

Clearly, these facts demonstrate that Petitioner's failure to litigate the antitrust claims in the first action was a result of counsel's failure to take advantage of available procedures. As the Circuit Court correctly found "[a]t some point, there must be an end to litigation and barring the appellant's second suit on the ground of *res judicata* is an equitable method of upholding that policy" (A-12). The Circuit Court properly considered the policy consid-

erations underlying the doctrine of *res judicata* and correctly ruled that "[Petitioner's] inability to litigate his antitrust claim is the result not of a deprivation of available process, but of counsel's failure to follow through with the full and fair opportunity that was available to him" (A-12). As such, the granting of a writ of certiorari is not necessary in this matter.

SUMMARY OF ARGUMENT

The Circuit Court correctly affirmed the finding of the district court which held that the allegations of Petitioner's First Amended Complaint were "substantially the same" as those of his previous suit, which centered around his association with a chiropractor.[2] Petitioner had a full and fair chance to pursue his case in his first suit against the "Central DuPage" Defendants, which included Doctors Mains and Severino.[3] Petitioner's claims against

[2] Petitioner has never asserted that the facts of both of his claims are not identical as based on the same core of operative facts and the same injury. Further, Petitioner never disputed the fact that there was a final judgment on the initial lawsuit. Accordingly, all of the requirements necessary for the doctrine of *res judicata* to apply have been met. *In re Energy Cooperative, Inc.*, 814 F.2d 1226 (7th Cir. 1987).

[3] All "Mona Kea" Defendants, which consist of Mona Kea Leasing Association, Mona Kea Owners Association, Mona Kea South Professional Condominium Association, Richard Dominguez, James H. Grissom, Donald Gustafson, and Francis S. Lichon, were added to the second suit. Lichon was dismissed with prejudice early in the suit.

Two of the "Central DuPage" Defendants in the previous case, Mains and Severino, are represented by the same counsel as the "Mona Kea" Defendants in the second suit. Therefore, Drs. Douglas

(Footnote continued on following page)

these Defendants were correctly deemed barred by *res judicata*.[4]

ARGUMENT

PETITIONER HAS FAILED TO SHOW THAT THE SEVENTH CIRCUIT'S OPINION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S FIRST AMENDED COMPLAINT AS BARRED BY *RES JUDICATA* CONFLICTS WITH ANY DECISION OF THIS COURT OR WITH THE DECISIONS OF ANY CIRCUIT COURT OF APPEALS AND RAISES NO QUESTION WORTHY OF THE GRANTING OF A WRIT OF CERTIORARI.

The decision by the Circuit Court illustrates that in affirming the decision of the district court, it properly considered the principles of fairness underlying the doctrine of *res judicata* and found that the doctrine was correctly applied. The decision by the Circuit Court is not inconsistent with any decision of this Court or with the decisions of any court of appeals and the petition raises no question worthy of the granting of a writ of certiorari.

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[3] *continued*
B. Mains and Ronald M. Severino, who were "Central DuPage" Defendants in the first suit, are actually "Mona Kea" Defendants in the second suit.

[4] The Mona Kea Defendants can rely on the *res judicata* doctrine because they stand in privity with Doctors Severino and Mains, who were officers of the Mona Kea condominium association, to which all "Mona Kea" Defendants belong. Petitioner never challenged the finding by the district court that held that the Mona Kea Defendants were entitled to rely upon the doctrine of *res judicata* as they stood in privity with the Central DuPage Defendants (A-9).

A. Petitioner's Failure To Take Advantage Of Procedural Safeguards Precludes His Argument That He Did Not Have A Fair And Full Opportunity To Litigate The Antitrust Claims.

It is well-established that the doctrine of *res judicata* "bars not only those issues which were actually decided in the prior action, but also any issues which *could have* been raised." *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1364 (7th Cir. 1988), *cert. denied*, 488 U.S. 856, 109 S.Ct. 145 (1988); *Lee v. City of Peoria*, 685 F.2d 196, 198 (7th Cir. 1982). Here, Petitioner voluntarily withdrew the antitrust claims from his original 1986 action. He was not required to do so. Moreover, Petitioner could have raised the previously abandoned antitrust claims after this Court's May 16, 1988 decision in *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658 (1988) was decided. Nothing prevented Petitioner from requesting leave from the Circuit Court to amend his complaint in order to re-establish those claims (G-10).

However, rather than seeking the permission of the Circuit Court to amend his complaint, Petitioner elected to confine his theory of liability to claims of civil rights violations. Even though Petitioner filed a motion before the Circuit Court to have his case remanded to the district court for addition of the antitrust claims, no oral argument was ever had on the motion. Petitioner's failure to fully pursue the motion to remand and/or reinstate before the Circuit Court, "even though the *Patrick* decision was already a year old by the time the final denial for rehearing issued from [the lower] court," (G-10), completely undermines Petitioner's argument that he was not afforded a full and fair opportunity to litigate his antitrust claims.

In *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-85, 101 S.Ct. 3107 (1981), this Court ruled that the "full and

fair opportunity to litigate" requirement concerns the procedural opportunity the claimant had to assert the claim sought to be barred by *res judicata*. In this regard, the *Kremer* Court stated that the procedural opportunity to assert a claim needs do no more than satisfy the minimal procedural requirements of the Due Process Clause in order to afford a litigant a full and fair opportunity to litigate the claim involved. *Id.* at 481. *Accord, Jones v. City of Alton*, 757 F.2d 878, 884 (7th Cir. 1985). The *Kremer* Court noted that only when there is "reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation" should the "full and fair opportunity to litigate" requirement be invoked to bar the application of *res judicata*. *Id.* at 481.

In the instant case, Petitioner was given more than a fair opportunity to litigate the merits of his antitrust claims yet he failed to avail himself of those opportunities. The Circuit Court applied well-established principles of *res judicata* and properly found that the abandoned antitrust claims Petitioner sought to reestablish were properly barred under the *res judicata* doctrine. Accordingly, Petitioner's attempt to bring these claims before this Court by way of writ of certiorari should be denied.

B. The Doctrine Of *Res Judicata* Was Properly Applied By The District Court And Affirmed By The Circuit Court.

In identifying causes of action for *res judicata* purposes, the Seventh Circuit has adopted the "operative facts" or "same transaction" test. *See, Shaver v. F.W. Woolworth, supra*; *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir. 1986). For purposes of this test, a cause of action has been defined as "consisting of a 'core of operative facts' which give rise to a remedy." *In re Energy Co-op, Inc.*, 814 F.2d 1226, 1230 (7th Cir.), *cert. denied*,

484 U.S. 928 (1987) (citations omitted). "Once a transaction has caused injury, all claims arising from that transaction must be brought in one suit or be lost." *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). Significantly, "the 'same transaction' test is decidedly fact oriented." *Id.* Here, the 'operative facts' in Petitioner's 1986 second amended complaint and his 1989 complaint are identical. In each action Petitioner sought damages arising from the same suspension of his staff privileges at Central DuPage Hospital ("CDH") as a result of his association with Dr. Chinnici, a chiropractor. Each seeks damages arising out of the same set of facts, *i.e.*, defendants' suspension of Petitioner's staff privileges at CDH as a result of his association with a chiropractic doctor. For *res judicata* purposes the complaints set forth identical causes of action. *See, Shaver, supra* at 1365 ("Since the two lawsuits involve [a] single core of operative facts, they constitute identical causes of action for *res judicata* purposes"). Further, even though a "single group of facts may give rise to different claims for relief upon different theories of recovery, under the federal definition a single cause of action remains." *Id.*

As noted by the court in *Car Carriers, Inc., supra*, this approach is consistent with the general litigation scheme established by the Federal Rules of Civil Procedure. Pursuant to the procedural rules, claimants have great latitude in amending pleadings. *See*, Fed.R.Civ.P. 15, 18. Such safeguards are also present at the appellate level. The policies and purposes behind the *res judicata* doctrine are undermined when a party fails to take advantage of the procedural rules and later attempts to relitigate claims that could have been raised in prior litigation. The purpose behind the doctrine is "that there be an end of litigation; that those who have contested an issue shall be

bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Car Carriers, Inc.*, 789 F.2d at 594, quoting, *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522, 525, 51 S.Ct. 517, 518 (1931). There is no reason that these policies should be ignored here.

Petitioner's reliance upon *Jones v. City of Alton*, 757 F.2d 878 (7th Cir. 1985), is misplaced and was properly distinguished by the Circuit Court in its decision (A-10,11). In distinguishing *Jones*, the Circuit Court first found that Petitioner failed to demonstrate that a change in law after the entry of judgment created an exception to the application of the federal *res judicata* law (A-10). Secondly, the Circuit Court correctly held that Petitioner was not prevented from relitigating the antitrust claim in the former suit, but rather he failed to take advantage of the procedural opportunity to litigate the antitrust claim after this Court's decision in *Patrick v. Burget* was handed down (A-11). Citing *Kremer*, the Circuit Court properly held that "[t]he requirement that a party have a full and fair opportunity to litigate an issue before *res judicata* may apply relates to the procedural opportunity rather than to a judicial determination of the merits of the issue" (A-11).

Additionally, Petitioner's reliance upon the *Chinnici* case is misplaced. The *Chinnici* case, dismissed in the district court in 1991, has no bearing on the case before the Court. Further, *Chinnici* is certainly not determinative as to whether the doctrine of *res judicata* was properly applied in this case. It is nonsensical for Petitioner to assert that a case, whether factually similar to the instant matter or not, can provide a basis for the granting of a writ of certiorari. This is especially true when the case upon which Petitioner seeks to rely has been dismissed.

The doctrine of *res judicata* operates to bar the same parties or their privies from re-litigating claims arising out of the same core of operative facts when a final judgment on the merits has been entered. *See, Schlangen v. Resolution Trust Corp.*, 934 F.2d 143 (7th Cir. 1991). Petitioner's assertion that the doctrine of *res judicata* is inoperable here because of the alleged pendency of the *Chinnici* case has no merit. Obviously, *Chinnici* involved a different plaintiff. Secondly, *Chinnici* was filed in 1989—the same year this case was filed, however, the doctrine of *res judicata* was applied in the instant matter as a result of the judgment that was entered in Petitioner's first suit which was filed in 1986. It was in the 1986 suit that Petitioner failed to diligently pursue his claims.

In essence, Petitioner urges this Court to ignore his 1986 law suit and the resultant judgment upon which the Circuit Court's *res judicata* decision is based and instead find that he be allowed to proceed with his 1989 suit because another plaintiff was allowed to pursue similar claims in another court. Petitioner's position is simply without merit. Unlike the Petitioner here, the *Chinnici* plaintiff apparently brought all of his claims in one suit. In the instant matter, not only does Petitioner fail to chronicle how his failure to pursue the litigation of the antitrust claims resulted in the judgments that have been entered in this and the former litigation but moreover Petitioner fails to inform the Court that *Chinnici* was dismissed. As such, *Chinnici* clearly has no relevance here.

The present matter presents a classic case for the application of the *res judicata* doctrine. The strict *res judicata* test has been met and the policies behind the doctrine support its application. Therefore, there are no questions worthy of the granting of a writ of certiorari to the Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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